U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 2 6 2013 OFFICE: NEBRASKA SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). It is now on appeal before the Acting Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a church. It seeks to employ the beneficiary permanently in the United States as a Director, Education Department, pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition was accompanied by an Application for Permanent Employment Certification, ETA Form 9089, certified by the U.S. Department of Labor (DOL).

In denying the petition, the Director found that the in , California – the institution that awarded the beneficiary a Master of Divinity in 2010 – has not been accredited by an accrediting agency recognized by the U.S. Department of Education (DOE) and the Council for Higher Education Accreditation (CHEA). Therefore, the beneficiary's degree from did not entitle him to the requested classification and did not meet the educational requirements on the ETA Form 9089. In addition, the Director found that the evidence of record failed to establish the petitioner's ability to pay the proffered wage of $35,235 per year.

On appeal, counsel states that has been granted institutional approval under California state law, and approved to enroll international students by the Department of Homeland Security (DHS). According to counsel, therefore, a Master of Divinity from should be accepted by U.S. Citizenship and Immigration Services (USCIS) as a valid degree. Counsel also submits additional evidence of the petitioner's ability to pay the proffered wage.

Factual and Procedural History

The ETA Form 9089 in this case was accepted for processing by the DOL on June 28, 2011, and certified by the DOL on January 30, 2012. The immigrant visa petition, Form I-140, was filed on March 9, 2012. Documentation submitted with the petition included academic records from the showing that the beneficiary was awarded a Master of Divinity on May 22, 2010, after completing three years of coursework. Also submitted with the petition were copies of the Forms W-2, Wage and Tax Statement, that the petitioner issued to the beneficiary, showing that the beneficiary was paid $3,000 in 2010 and $7,000 in 2011.

In a request for evidence (RFE) issued on May 16, 2012, the Director cited information from CHEA and DOE databases that is not an accredited institution. In response to the RFE, counsel for the petitioner submitted documentation showing that has been granted institutional approval by the State of California's Bureau for Private Postsecondary and Vocational Education (BPPVE) and its successor organization, the Bureau for Private Postsecondary Education, in accordance with the provisions of the California Education Code (Cal. Ed. Code).[1] Counsel submitted a photocopied

[1] In 2010, the Private Postsecondary Education Act of 2009 replaced the BPPVE with the Bureau for Private Postsecondary Education (BPPE).

document from the BPPE confirming that currently has "Approval" for seven degree programs, including its Master of Divinity. The "Institutional Approval" document in the record, which was granted by the BPPVE and valid from July 1, 2005 through June 30, 2008, described "approval to operate" as follows:

> An approval to operate means that the Bureau has determined and certified that an institution meets the minimum standards established by the council for integrity, financial stability, and educational quality, including the offering of bona fide instruction by qualified faculty and the appropriate assessment of student's achievement prior to, during, and at the end of its programs.

As further evidence of institutional status, counsel submitted a letter from the Dean of Academics at California, stating that that accepts course credits from Master of Divinity program. Counsel also pointed out that is certified by the Department of Homeland Security (DHS) under the Student Exchange and Visitor Program (SEVP) to enroll foreign students.

The Director denied the petition on October 26, 2012, finding that has not been accredited by an organization recognized by either the DOE or the CHEA. The Director concluded that the beneficiary's Master of Divinity from is not sufficient to make him eligible for classification as an advanced degree professional under the Act or to meet the educational requirements of the offered position as set forth on the labor certification. The Director also concluded that the petitioner failed to establish its ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2).

On appeal, counsel reiterates his contention that the beneficiary's Master of Divinity should be accepted by the AAO as a valid credential because has been granted institutional approval by the State of California. According to counsel, the Director did not give due weight to the letter from GMU and wrongfully held that must be listed in the DOE and/or CHEA database(s) to be considered accredited for purposes of the Act. Counsel also asserts that the Director did not give the petitioner adequate opportunity to establish its ability to pay the proffered wage. As additional evidence of the petitioner's ability to pay, counsel submits copies of five monthly bank statements from 2012.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record. The issues on appeal are:

- Whether the beneficiary's Master of Divinity from the is an "advanced degree" as required for classification as a member of the professions with an advanced degree under section 203(b)(2) of the Act.
- Whether the beneficiary's Master of Divinity meets the minimum educational requirements of the offered position set forth on the ETA Form 9089.
- Whether the petitioner has established its continuing ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2).

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[2] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> . . . . . .
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

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[2] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if

the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

Eligibility for the Classification Sought

In the instant case, the petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

Section 203(b)(2) of the Act provides for immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States.[3] The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The AAO will not consider a degree from an unaccredited college or university to satisfy the definition of an advanced degree. As stated by the Department of Education (DOE) on its website:

> The [DOE] does not accredit educational institutions and/or programs. However, the Secretary of Education is required by law to publish a list of nationally recognized accrediting agencies that the Secretary determines to be reliable authorities as to the quality of education or training provided by the institutions of higher education and the higher education programs they accredit. An agency seeking [recognition must meet the] procedures and criteria for the recognition of accrediting agencies, as published in the *Federal Register* . . . .
> The United States has no . . . centralized authority exercising . . . control over postsecondary educational institutions in this country. . . . [I]n general, institutions of higher education are permitted to operate with considerable independence and autonomy. As a consequence, American educational institutions can vary widely in the character and quality of their programs.
> [T]he practice of accreditation arose in the United States as a means of conducting nongovernmental, peer evaluation of educational institutions and programs. Private

[3] Section 203(b)(2) of the Act also provides immigrant classification to aliens of exceptional ability. There is no evidence in the record of proceeding that the beneficiary possesses exceptional ability in the sciences, arts or business. Accordingly, consideration of the petition will be limited to whether the beneficiary is eligible for classification as a member of the professions holding an advanced degree.

> educational associations of regional or national scope have adopted criteria reflecting the qualities of a sound educational program and have developed procedures for evaluating institutions or programs to determine whether or not they are operating at basic levels of quality.
> . . . Accreditation of an institution or program by a recognized accrediting agency provides a reasonable assurance of quality and acceptance by employers of diplomas and degrees.

www.ed.gov/print/admins/finaid/accred/accreditation.html.

The DOE's purpose in ascertaining the accreditation status of U.S. colleges and universities is to determine their eligibility for federal funding and student aid, and participation in other federal programs. Outside the federal sphere, the Council for Higher Education Accreditation (CHEA), an association of 3,000 degree-granting colleges and universities, plays a similar oversight role. As stated on its website:

> Presidents of American universities and colleges established CHEA [in 1996] to strengthen higher education through strengthened accreditation of higher education institutions . . . .
>
> CHEA carries forward a long tradition that recognition of accrediting organizations should be a key strategy to assure quality, accountability, and improvement in higher education. Recognition by CHEA affirms that standards and processes of accrediting organizations are consistent with quality, improvement, and accountability expectations that CHEA has established. CHEA will recognize regional, specialized, national, and professional accrediting organizations.
>
> Accreditation, as distinct from recognition of accrediting organizations, focuses on higher education institutions. Accreditation aims to assure academic quality and accountability, and to encourage improvement. Accreditation is a voluntary, non-governmental peer review process by the higher education community . . . . The work of accrediting organizations involves hundreds of self-evaluations and site visits each year, attracts thousands of higher education volunteer professionals, and calls for substantial investment of institutional, accrediting organization, and volunteer time and effort.

www.chea.org/pdf/Recognition_Policy-June_28_2010-FINAL.pdf.

The DOE and CHEA recognize six regional associations that accredit U.S. colleges and universities. One of these is the Western Association of Schools and Colleges (WASC), Accrediting Commission for Senior Colleges and Universities – whose geographical scope includes California, Hawaii, and other U.S. possessions in the Pacific, and whose membership represents a broad range of public and private schools in the region and other education-related organizations. The WASC website includes

a list of all the higher educational institutions in its jurisdiction that are either accredited or candidates for accreditation. [redacted], California, does not appear on that list. *See* www.wascsenior.org/apps/institutions. Thus, [redacted] has not been accredited by the applicable accrediting agency recognized by the DOE and CHEA – the WASC's Accrediting Commission for Senior Colleges and Universities – and there is no evidence that [redacted] has requested accreditation by that agency.

The State of California acknowledges the qualitative difference between accredited and unaccredited educational institutions. The California Postsecondary Education Commission (CPEC), the state's planning and coordinating body for higher education from 1974 to 2011,[4] includes the following language regarding the "benefits associated with accreditation" on its website:

> Both the federal government and the states use accreditation as an indication of the quality of education offered by American schools and colleges.
>
> At the federal level, colleges and universities must be accredited by an agency recognized by the United States Secretary of Education in order for it or its students to receive federal funds.
>
> At the state level, California allows colleges and universities that are accredited by the Western Association of Schools and Colleges (the recognized regional accrediting agency for California) to grant degrees without the review and approval of the Bureau for Private Postsecondary Education (BPPE). A list of approved institutions is available at the California Bureau for Private Postsecondary Education (BPPE).
>
> In some states, it can be illegal to use a degree from an institution that is not accredited by a nationally recognized accrediting agency, unless approved by the state licensing agency. This helps prevent the possibility of fraud . . . .

www.cpec.ca.gov/CollegeGuide/Accreditation.asp.

The CPEC website goes on to warn about state laws in Illinois, Indiana, Maine, Michigan, Nevada, New Jersey, North Dakota, Oregon, Texas, and Washington regarding degree/diploma mills. *See id.*

The qualitative difference between accredited and unaccredited educational institutions, acknowledged by the CPEC, is also recognized by the State of California in its Education Code. Cal. Ed. Code section 94813 defines "accredited" as follows:

> "Accredited" means an institution is recognized or approved by an accrediting agency recognized by the United States Department of Education.

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[4] The CPEC ceased operations on November 18, 2011, after its funding was eliminated. *See* http://www.cpec.ca.gov.

With respect to unaccredited institutions that are approved to operate in California, Cal. Ed. Code section 94817.5 provides the following basic definition:

> "Approved to operate" or "approved" means that an institution has received authorization pursuant to this chapter to offer to the public and to provide postsecondary educational programs.

Cal. Ed. Code section 94887 sets the following guideline for the BPPE's grant of an approval to operate:

> An approval to operate shall be granted only after an applicant has presented sufficient evidence to the bureau [BPPE], and the bureau has independently verified the information provided by the applicant through site visits or other methods deemed appropriate by the bureau, that the applicant has the capacity to satisfy the minimum operating standards . . . .

Accreditation is intended "to assure academic quality and accountability" (CHEA) and to provide "a reasonable assurance of quality and acceptance by employers of . . . degrees" awarded by the accredited institutions (DOE). Moreover, the imprimatur of a regional accrediting agency guarantees that a school's degrees will be recognized and honored nationwide. By comparison, an approval to operate by California's BPPE is a lower level endorsement that an educational institution "has the capacity to satisfy the minimum operating standards" (Cal. Ed. Code section 94887) with no guarantee that degrees awarded by that school in California will be recognized and honored nationwide.

The Act is a federal statute with nationwide application. The regulations implementing the Act – including 8 C.F.R. § 204.5(k)(2) defining "advanced degree" for the purposes of section 203(b)(2) of the Act – also have nationwide application. As defined in 8 C.F.R. § 204.5(k)(2), an "advanced degree" includes "any **United States academic or professional degree** . . . above that of baccalaureate" (or a foreign equivalent degree), "[a] **United States baccalaureate degree**" (or a foreign equivalent degree) and five years of specialized experience (considered equivalent to a master's degree), and "a **United States doctorate**" (or a foreign equivalent degree). (Emphases added.) Similarly, "professional" is defined in 8 C.F.R. § 204.5(l)(2) as "a qualified alien who holds at least a **United States baccalaureate degree**" (or a foreign equivalent degree). (Emphasis added.) The repeated usage of the modifier "United States" to describe the different levels of (non-foreign) degrees makes clear the intention of the rulemakers that the regulations apply to degrees issued by U.S. educational institutions that are recognized and honored on a nationwide basis. The only way to assure nationwide recognition for its degrees is for the educational institution to secure accreditation by a regional accrediting agency approved by the DOE and CHEA.

For an educational institution in California, the regional accrediting agency is WASC's Accrediting Commission for Senior Colleges and Universities. As previously discussed, the school that issued

the beneficiary's degree – the [redacted], California – is not on the WASC list of accredited institutions. Nor is [redacted] listed as a candidate for accreditation. Accordingly, the beneficiary's Master of Divinity from [redacted] cannot be deemed to have nationwide recognition. Therefore, it does not qualify as an advanced degree within the meaning of 8 C.F.R. § 204.5(k)(2).

With regard to counsel's complaint that the Director did not give due weight to the letter from the Dean of Academics at [redacted] California, the AAO notes that [redacted], like [redacted], does not appear on the WASC list of accredited (or candidate) institutions. The acceptance by one unaccredited institution of course credits from another unaccredited institution is not sufficient to establish that a master's degree from one of them meets the definition of an advanced degree under 8 C.F.R. § 204.5(k)(2).

In addition, counsel's claim that the beneficiary's degree from [redacted] should be accepted as an advanced degree because the DHS has approved the school for attendance by foreign students is rejected. The approval of an institution for attendance by foreign students in F-1 nonimmigrant visa status[5] is unrelated to the requirements for classification as an advanced degree professional. A broad range of educational institutions are eligible for attendance by foreign students, including community colleges, junior colleges, seminaries, conservatories, high schools, elementary schools, and institutions which provide language training, instruction in the liberal arts or fine arts, and/or instruction in the professions. *Id.*

Based on the foregoing analysis, the AAO determines that the beneficiary is not eligible for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act and 8 C.F.R. § 204.5(k)(2). Thus, the petition cannot be approved.

Qualifications for the Job Offered

The beneficiary must also meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor

[5] *See* 8 C.F.R. § 214.3.

certification, must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification – "Job Opportunity Information" – describes the terms and conditions of the job offered. In this case, Part H, lines 4 and 4-B of the labor certification state that the minimum educational requirement to qualify for the proffered position is a master's degree in theology, divinity, or a related field. Line 9 states that a "foreign educational equivalent" is acceptable. Lines 5 and 6 state that no training or experience in the job offered is required. Line 8 states that no alternate combination of education and experience is acceptable.

The beneficiary does not meet the above requirements. As previously discussed, the beneficiary's degree from California, though called a Master of Divinity, does not qualify as a U.S. master's degree in divinity because it was not awarded by an educational institution that has been accredited by a regional accrediting agency recognized by the DOE and CHEA. Nor does the beneficiary have a foreign educational equivalent to a master's degree in divinity. While the record shows that the beneficiary earned a Bachelor of Music from Korea on February 25, 1987, this degree was not equivalent to a U.S. master's degree and was not in the field of divinity or theology. Since he does not fulfill the educational requirements in Part H of the labor certification, the beneficiary does not qualify for the job offered. For this reason as well, the petition cannot be approved.

Ability to Pay the Proffered Wage

With regard to the petitioner's ability to pay the proffered wage, the regulation at 8 C.F.R. § 204.5(g)(2) provides as follows:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The proffered wage for the offered position is $35,235 per year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As previously discussed, the petitioner submitted the Forms W-2 it issued to the beneficiary for 2010 and 2011 with the Form I-140 petition it filed in March 2012. In support of the instant appeal the petitioner has submitted five Wells Fargo bank statements for June, July, August, September and October 2012.

In determining a petitioner's ability to pay the proffered wage between the priority date and the present, USCIS first examines whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

In this case, the labor certification states that the petitioner's employment of the beneficiary began on October 1, 2010. The Forms W-2 show that the beneficiary was paid $3,000 in 2010 and $7,000 for 2011. These amounts were far below the proffered wage of $35,235 per year. Thus, the petitioner cannot establish its ability to pay the proffered wage based on its actual compensation to the beneficiary from the June 28, 2011 priority date.

There are no federal tax returns in the record from which the petitioner's ability to pay the proffered wage can be determined. A letter in the record from the Internal Revenue Service (IRS) identifies the petitioner as charitable organization under section 501(c)(3) of the Internal Revenue Code, and thus exempt from federal taxation. Accordingly, the petitioner is not required to file federal tax returns. The only other documentation of the petitioner's financial condition are the bank statements from Wells Fargo. No other documentation has been submitted by the petitioner. While counsel complains that no request for additional financial documentation was made in the RFE, the petitioner was specifically advised in the Director's decision of the types of documentation that should be submitted to establish its ability to pay the proffered wage. Thus, the petitioner has had ample opportunity to submit additional evidence. The bank statements were the only items submitted on appeal.

As is noted above, the petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.* The petitioner did not submit tax returns, annual reports or audited financial statements covering the period from the priority date. The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In addition, counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, bank statements, without more, are unreliable indicators of ability to pay because they do not identify funds that are already obligated for other purposes.

In addition to the preceding analysis, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or

an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The petitioner has not submitted evidence establishing that the factors set forth in *Sonegawa* apply to the instant case. There is no basis in the record – such as an established business history of financial growth or evidence of other financial resources – to conclude that the petitioner has had the ability to pay the proffered wage from the priority date onward. Thus, assessing the totality of the evidence, the AAO concurs with the director that the petitioner has failed to establish that it has had the continuing ability to pay the proffered wage beginning on the priority date.

In accordance with the foregoing analysis, the AAO determines that the petitioner has not established its ability to pay the proffered wage.

Conclusion

The beneficiary does not have an "advanced degree" within the meaning of 8 C.F.R. § 204.5(k)(2), and thus is not eligible for preference visa classification under section 203(b)(2) of the Act. Nor does the beneficiary meet the educational requirements on the labor certification to qualify for the job offered. In addition, the petitioner has failed to establish its continuing ability to pay the proffered wage from the priority date up to the present.

For the reasons stated above, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.